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No. 09-1360

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TOTES-ISOTONER CORPORATION,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6, petitioner Totes-Isotoner Corporation ("Totes") hereby replies to new points raised in the Brief for the United States in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

ARGUMENT

Totes asks this Court to grant certiorari in order to determine whether certain provisions of the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202, which impose different rates of customs duty on goods based solely on the gender of the persons using those goods, "discriminate facially" on the basis of gender or age. Pet., at i. That the challenged provisions impose different rates of duty solely on the basis of gender is beyond dispute: HTSUS Subheading 4203.29.30 sets a tariff rate of 14% *ad valorem* on certain "men's" leather gloves, while each of HTSUS Subheadings 4203.29.40 and 4203.29.50 sets a tariff rate of 12.6% *ad valorem* on identical gloves "[f]or other persons." The difference in the rate of tax turns solely on the determination by an officer of U.S. Customs and Border Protection ("Customs") of the gender of the article's intended user.

In its Brief in Opposition, the United States now contends that the "HTSUS provisions at issue in this case . . . are not gender-based classifications," Br. in Opp. 7, but instead merely represent distinctions between "products," *ibid.*[1] For support,

[1] In the courts below, the United States did not dispute that the challenged tariff provisions discriminated according

the United States relies on Judge Prost's concurring opinion below (Pet. App. 25a-29a), which asserts that the HTSUS "distinguishes on the basis of products, not natural people." Pet. App. 27a-28a. Judge Prost's concurrence, which the government cites in its Brief in Opposition as dispositive of this case, also asserts that "[m]uch like tuxedos and evening gowns are different products, men's and women's gloves are different products," *id.* at 28a, while conceding that "the English language does not have different names for these particular products, thus requiring reference to the gender of the intended wearer . . . . ," *ibid.*

1. The United States' argument misapprehends the question presented by Totes' petition. Totes readily concedes that the government may, in the HTSUS, impose different rates of customs duty on goods based on differences in their nature, construction, materials, or uses. To borrow Judge Prost's example, "tuxedos and evening gowns" are clearly different classes of goods, which can be—and, in the HTSUS, are—distinguished on the basis of various characteristics that do not implicate Constitutional equal protection guarantees. Only where a difference in the rate of tax is driven *solely* by a gender classification are the Constitution's equal protection provisions implicated and, absent a governmental showing of "exceedingly persuasive justification," violated. *United States v. Virginia* (*VMI*), 518 U.S. 515, 531 (1996). This is such a case; moreover, as noted by more than 150 additional equal protection challenges

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to gender, but instead suggested that the assigned tariff rates were judicially non-reviewable under the "political question" doctrine, or, in the alternative, that Totes had not sufficiently pleaded its equal protection challenge.

currently pending in the United States Court of International Trade (USCIT), the HTSUS contains dozens of other provisions that likewise discriminate in the rate of duty imposed solely upon a gender or age determination.

2. To classify goods for duty assessment purposes without making any reference to the gender or age of the user is certainly possible; indeed, most provisions of the HTSUS do so. For HTSUS provisions to classify goods on the basis of their principal use, without implicating equal protection guarantees, is likewise possible. For example, the HTSUS in some cases distinguishes leather gloves based on whether they are "designed for use in sports." *See, e.g.*, HTSUS Subheading 4203.21. However, a "principal use" classification based on gender of the user does not ask for *what* the product is intended, but for *whom* the product is intended. When the critical determination is the gender of the person for whom the good is intended, and such determination results in a higher rate of duty than otherwise would be imposed, gender discrimination clearly has been established. Where, as here, both the requirement for Customs to make a gender determination and the higher rate of duty resulting therefrom appear expressly in the language of the statute, the statute is "facially" discriminatory, and thus the burden of defending it under equal protection principles shifts back to the Government. *See VMI*, 518 U.S. at 531. This case, and the scores of others pending in the USCIT, focus solely on those provisions of the HTSUS that (i) command the Customs official responsible for the classification to make a determination based on the gender or age of the person presumably using an imported

product and (ii) impose a higher rate of duty as a result of said determination.

3. The United States' position conflates classification choices that do not involve gender or age, (and do not implicate equal protection guarantees) with the choice mandated by statute in this case, which *does* involve gender and age classifications, and bases rates of duty on such classifications.

The HTSUS is a statute that employs a hierarchical structure of headings and subheadings in order to describe and classify merchandise, together with a series of Section and Chapter Notes, and General Rules of Interpretation to direct Customs officers in classifying imported goods.[2] The classification of merchandise, in turn, determines the rate of duty to be assessed. Customs officers are required to use the HTSUS to carry out the statutory duty set out in 19 U.S.C. § 1500(b), which requires that, for each entry of goods imported into the United States, Customs shall, *inter alia*, "fix the final classification and rate of duty applicable to such merchandise." In order for a Customs officer to classify Totes' subject gloves under HTSUS Subheading 4203.29.30, the officer must make numerous classification decisions. However, the only decision that determines whether the gloves will be taxed at the

[2] *See* HTSUS Gen. Note 7(f)(6) (describing the hierarchical structure of headings and subheadings); HTSUS Gen. R. Interpretation 1 (providing that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to" subsequent General Rules of Interpretation). The status of the HTSUS as statutory law is established at 19 U.S.C. § 3004(c)(1).

12.6% *ad valorem* rate or at the 14% *ad valorem* rate is the Customs officer's determination regarding the gender of the person who presumably will use the glove. This can be illustrated by examining the various questions that a Customs officer must answer in reaching a classification under HTSUS Subheading 4203.29.30.

First, the statute reads, in relevant part with emphasis added:

> Chapter 42—Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut)[3]:
>
> 4203 Articles of apparel and clothing accessories, of leather or of composition leather:
>
> * * *
>
> Gloves, mittens and mitts:
>
> 4203.21 Specially designed for use in sports:
>
> * * *
>
> 4203.29 Other:
>
> Gloves of horsehide or cowhide (except calfskin) leather:
>
> * * *

[3] Pursuant to General Rule of Interpretation 1 of the HTSUS, the titles of sections, chapters and sub chapters of the HTSUS are for reference only, and do not govern classification. The title of HTSUS Chapter 42 is reproduced here for reference only.

	Other:	
4202.29.20	Not seamed . . .	
	Other:	
4202.29.30	*Men's*	*. . . 14%*

* * *

	For other persons:	
4202.29.40	*Not lined*	*. . . 12.6%*
4203.29.50	*Lined*	*. . . 12.6%*

To classify goods under this provision and assess duties, the Customs officer must make a methodical, ordered number of determinations, as follows:

Determination by Customs Officer	Consequence under HTSUS
(1) Is the product "of leather?"	If "yes," the product should be classified in HTSUS Chapter 42.
(2) Is the product an "article of apparel or clothing accessory?"	If "yes," the product should be classified in HTSUS Heading 4203.
(3) Is the article a "glove, mitten or mitt?"	If "yes," the product should be classified in either of HTSUS Subheadings 4203.21 or 4203.29.
(4) Is the glove "specially designed for use in sports?"	If "no," the product should be classified in HTSUS Subheading 4203.29.

(5) Is the glove "of cowhide or horsehide leather?"	If "no," the product cannot be classified in HTSUS Subheadings 4203.29.05 through 4203.29.18.
(6) Is the glove "seamed?"	If "no," the product cannot be classified in HTSUS Subheading 4203.29.20.

To this stage in the classification analysis, the Customs officer has made numerous determinations, none of which implicates equal protection guarantees, and none of which fixes the rate of duty to be assessed. At this point, the gloves might be subjected to duty either at the rate of 14% *ad valorem* or at the rate of 12.6% *ad valorem*. The tax rate depends solely on resolution of the following question:

Determination by Customs Officer	**Consequence under HTSUS**
(7) Is the glove a "men's" glove?	If "yes," the product is classified under HTSUS Subheading 4202.29.30, and duties are imposed at a rate of 14% *ad valorem*. If "no," the product is classified under HTSUS Subheading 4202.29.40 or 4202.29.50, in either case dutiable at the rate of 12.6% *ad valorem*.

The use of a gender identification in a test to determine the rate of duty to be imposed on the goods is the sole basis for Totes' claim. The HTSUS, on its face, requires the use of a gender classification to set the rate of duty applicable to the gloves at bar. This, Totes contends, implicates Constitutional equal protection guarantees and requires the government to offer an "exceedingly persuasive justification" for the gender-based discrimination. *VMI*, 518 U.S. at 531. This is where the Constitutional infirmity in the statute resides.

4. In carrying out its statutory mandate, Customs reaches its decision to impose the higher rate of duty complained of strictly and solely on the basis of the user's gender. *See, e.g.*, Customs Ltr. Rul. NY J81532 (Mar. 27, 2003). In classifying goods according to gender, Customs officials take into account secondary sex characteristics of the products' intended users, such as size, musculature, and contours of the body in order to determine the gender of the persons who principally will use the merchandise. *See, e.g.*, *A. Zerkowitz & Co. Inc. v. United States*, 54 Cust. Ct. 151, 160 (1965) (using differences in male and female "natural foot contours" to determine the user of imported footwear); Customs Ltr. Rul. HQ 954885 (Oct. 13, 1993) (referring to the "cut" of a garment making the garment more suitable for use by one sex). Customs also may base gender classifications on factors such as styling and labeling designed to appeal to one sex or the other. *See, e.g.*, *Customs Information Exchange Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, 52 Fed. Reg. 52,563, 52,564 (Dec. 28, 1988) (noting, under the heading "Apparel—Sex of Wearer," that Customs

"should . . . consider[ ]: "(1) [s]izing, (2) construction, (3) styling, and (4) other factors such as packaging, labelling, etc." in determining the sex of the principal users of various apparel products). Regardless of the specific criteria that a Customs officer may employ in making a classification of goods—which is by law presumed to be correct and supported by all required findings of fact, *see* 28 U.S.C. § 2639(a)(1)—the classification and rate of duty is driven solely by a gender determination, and is therefore subject to equal protection scrutiny.[4]

5. The United States also shifts its position when it contends that the challenged HTSUS provisions do not distinguish goods based upon the user's gender, but merely "describe a seamed leather glove based on the principal use for which it is designed." Br. in Opp. 7. Before the Federal Circuit, the United States admitted that the challenged provisions premised duty rates on gender classifications: as the Federal Circuit noted, "Indeed the government admits that 'the subheadings at issue require Customs to differentiate between gloves because they are targeted for use by specific genders.'" Pet. App. 17a (quoting Def.-Appellee's Br. 63).

The Government's contention, derived from Judge Prost's concurrence below, that "men's" gloves and gloves "for other persons" are somehow different classes of goods, distinguished by some-

[4] Some provisions of the tariff that distinguish goods according to the gender of the intended user do not establish different rates of duty based on gender differentials. By virtue of the fact that the duty rates are the same regardless of the intended user's gender or age, such provisions would not deny equal protection of the laws.

thing other than gender, is unsupported, facile, and dangerous, indicating precisely the reason for which the writ of certiorari should be issued in this case. Under this view, the government could simply write Constitutional equal protection guarantees out of existence simply by discriminating against the goods used primarily by given classes of persons, rather than against the persons themselves. This rationale could lead to a dangerous use of Congress' Taxing power to allow government to oppress a disfavored group. For example, one might justify a confiscatory tariff rate imposed on "yarmulkes" in contrast to a lower rate on "other skull caps," simply by claiming them to be different "classes" of merchandise. In like fashion, "kosher" and "other" chickens might be termed different "classes" of goods, and taxed differently. Numerous other measures targeted at goods principally used by particular religious, racial, ethnic, gender, or age groups could be justified by this simple expedient—which is the very rationale used by the lower court to hold that the HTSUS provisions challenged here are not "facially" discriminatory.

The flaw of this approach is evident in Judge Prost's concurring opinion below, where she concedes that "[t]he happenstance that the English language does not have separate names for these particular products [men's and women's gloves], thus requiring reference to the gender of the intended wearer, does not transform the distinction into facial discrimination." Pet. App. 28a. Totes respectfully suggests that the flaw is not in the limitations of the English language; rather, Judge Prost's inability to articulate any distinction between the products other than in terms of

gender shows the statutory language to be facially discriminatory.

6. The United States seeks to distinguish *Manufacturers Hanover Trust Co. v. United States*, 775 F.2d 459 (2d Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986), on the ground that "nothing in the HTSUS treats 'similarly situated men and women differently'[; r]ather, the HTSUS simply mandates different treatment for classes of gloves that are similar in certain respects but different in others." Br. in Opp. 8 (quoting *Mfrs. Hanover Trust Co.*, 775 F.2d at 463). This statement again disregards the gender-specific basis for the statutory classification determinations that fix rates of duty. The *only* respect in which gloves are different, for duty-rate purposes, is whether the user will be a man or a woman. The gloves are identical in all other ways. Similarly situated men and women—the persons who use the imported gloves—are treated differently in that their gloves have been subjected to unequal tariff levels. As the Federal Circuit correctly noted, "[t]he claimed discrimination is based on the sex of the glove users, not the sex of the glove purchasers." Pet. App. 17a.

Likewise, the United States' argument that "unlike the estates at issue in *Manufacturers Hanover Trust*, importers of seamed leather gloves do not 'channel[ ]' the effects of a gender-based classification upon individual men and women, since the application of the tariff schedule does not depend on the sex of the gloves' purchasers," is an inadequate ground for distinction. Br. in Opp. 8-9 (quoting *Mfrs. Hanover Trust Co.*, 775 F.2d at 463). The application of the tariff schedule depends solely and entirely on the sex of the

gloves' users, all of whom are individual men and women.

CONCLUSION

The challenged HTSUS provisions discriminate in the imposition of tariffs solely on the basis of a gender determination. The United States' efforts to sweep these clear discriminations under the rug by blithely asserting that men's and women's gloves—identical in all respects save the gender of the users—are different "classes" of merchandise, is a dangerous formulation that would write equal protection guarantees out of the Constitution, and open a loophole through which persons of different gender, racial, religious, ethnic, and age groups could be oppressed through discriminatory taxation of their property. To avoid such a possibility, and to rectify equal protection violations already present in the HTSUS, this Court should grant Totes' petition for a writ of certiorari.

Respectfully submitted,

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